Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-76-1994
SITI NORMA YAAKOB, VC GEORGE JJCA AND AHMAD FAIRUZ J
12, 15 OCTOBER 1995

Landlord and Tenant *— Renewal — Uncertainty — Option for renewal at a rent to be agreed — Parties could not agree on rent — No machinery or formula for court to ascertain rent if parties could not come to an agreement on rent — Whether court could lend their aid to the enforcement of incomplete agreement — Whether option void for uncertainty*

Contract *— Uncertainty — Void — Tenancy agreement contained option clause — Option for renewal at a rent to be agreed — Parties could not agree on rent — No machinery or formula for court to ascertain rent if parties could not come to an agreement on rent — Whether option void for uncertainty*

Wilson Parking (M) Sdn Bhd ('the respondents') occupied and operated a car park owned by Wisma Sime Darby Sdn Bhd ('the appellants'). The option clause in the tenancy agreement provided, inter alia, that the appellants shall, on the written request of the respondents made three months before the expiration of the existing term, grant a tenancy of the premises for a further term of three years from the expiration of the term at a rent to be agreed. The respondents gave notice in writing within the stipulated period of their intention to exercise the option to renew the tenancy but made no mention of the rental for the proposed new term. Eventually, in response to the appellants' invitation to make an offer in respect of the rental in competition with others who had been invited to tender for the tenancy, the respondents made an offer. The respondents' tender was not accepted and the existing lease was extended for another two months to enable the respondents to wind up the car park operations. The respondents, however, took the view that because they had exercised the option within the requisite period, there was in fact a concluded tenancy agreement in respect of the car park for another three years from the date of the expiration of the term. They contended that the fact that there had been no agreement on the rental was not relevant. The appellants did not share that view and issued a writ seeking a declaration that the respondents' tenancy had been lawfully determined and for vacant possession and damages. By two summonses, the appellants sought an injunction restraining the respondents from obstructing the appellants retaking possession of the premises and summary judgment under O 14 of the Rules of the High Court 1980. The respondents, in turn, took out a summons to restrain the tenants from interfering with their continued occupation

of the premises until the trial of the action. All three summonses were dismissed. The appellants appealed. The High Court judge's grounds of judgment were not made available to the Court of Appeal, and the respondents submitted that the correct order to be made was that the judge had refused to dispose of the issues summarily. They contended that there appeared to be a conflict of judicial opinion on the effect of the option clause and, accordingly, there ought to be a trial of the action. They further argued that since possession was in issue, the status quo ought to be maintained, ie the respondents should be kept in possession. The appellants contended that there was no real conflict in the case law on the point and all the material required for the determination of the relevant issues were before the court, and that accordingly, the matter was proper for summary disposal and the judge should have adjudicated the issues and granted the orders sought for by the appellants.

Held, allowing the appeal:

(1) An option clause is void for uncertainty unless the agreement provided the machinery or some formula which the courts can utilize to ascertain what is otherwise unascertainable without the parties coming to an agreement. The courts will not lend their aid to the enforcement of an incomplete agreement. In the instant case, the rental for the renewed period of the tenancy had to be agreed by the parties. The agreement for renewal was executory and there was no machinery or formula for the court to ascertain the rent if the parties could not come to an agreement on the rent. On authority and on principle, the alleged agreement was bad for uncertainty. Thus, the option clause for a further term at 'a rent to be agreed' was void for uncertainty and there was no need for a trial to come to that conclusion (see pp 93F, 94E and 95D); *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665 and *Zainal Abidin v Century Hotel Sdn Bhd* [1987] 1 MLJ 236 followed.

(2) It could not be said that it was implied that the appellants should have done all that was reasonably necessary to ensure that the parties reached an agreement because that would be asking the court to add yet another clause to the agreement. In any event, neither parties nor the court may insist that the parties come to an agreement (see p 95F).

(3) The fact that the respondents believed that there would be a renewal of the tenancy and went about their business on the basis of such belief did not per se estop the appellants from taking the position that there would be no renewal of the tenancy or do away with the requirement that an agreement had to be arrived at on rental before there was renewal. There was no representation that the respondents had acted to their detriment entitling them to rely on estoppel (see pp 95I and 96A).

A

[Bahasa Malaysia summary

Wilson Parking (M) Sdn Bhd ('penentang-penentang') menduduki dan mengendali suatu medan kereta yang dimiliki oleh Wisma Sime Darby Sdn Bhd ('perayu-perayu'). Fasal opsyen dalam perjanjian penyewaan memperuntukkan, antara lain, bahawa perayu-perayu B harus, atas permintaan bertulis penentang-penentang yang dibuat tiga bulan sebelum tamatnya tempoh yang wujud, memberi penyewaan premis itu untuk tempoh tiga tahun selanjutnya dari tamatnya tempoh pada satu sewa yang disetujui. Penentang-penentang telah memberi notis bertulis dalam tempoh yang disyaratkan tentang tujuan mereka untuk melaksanakan opsyen membaharui penyewaan, tetapi tidak C menyebut tentang sewa bagi tempoh baru yang dicadangkan itu. Akhirnya, sebagai balasan terhadap jemputan perayu-perayu untuk membuat tawaran sewa, bersaing dengan lain yang telah dijemput untuk membuat tender penyewaan, penentang-penentang membuat satu tawaran. Tender penentang-penentang tidak diterima dan pajakan D yang wujud dilanjutkan selama dua bulan lagi bagi membolehkan penentang-penentang menggulung operasi medan kereta. Namun demikian, penentang-penentang telah mengambil pandangan bahawa oleh sebab mereka telah melaksanakan opsyen dalam tempoh masa yang dikehendaki, memang terdapatnya satu perjanjian penyewaan yang disempurnakan berkaitan dengan medan kereta selama tiga E tahun selanjutnya dari tarikh tamatnya tempoh. Mereka berhujah bahawa fakta bahawa tidak terdapat persetujuan mengenai sewa adalah tidak relevan. Perayu-perayu tidak bersetuju dengan pandangan itu lalu mengeluarkan satu writ meminta satu deklarasi bahawa penyewaan penentang-penentang telah ditentukan secara sah dan F untuk milikan kosong serta ganti rugi. Melalui dua saman, perayu-perayu telah meminta satu injunksi untuk menahan penentang-penentang daripada menghalang perayu-perayu mengambil semula milikan premis itu dan penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Penentang-penentang, sebagai balasan, mengambil satu saman bagi menahan penyewa daripada G bercampur tangan dalam pendudukan mereka secara berterusan di premis itu sehingga perbicaraan tindakan. Kesemua tiga saman telah ditolak. Perayu-perayu membuat rayuan. Alasan penghakiman hakim Mahkamah Tinggi tidak disediakan kepada Mahkamah Rayuan dan penentang-penentang menghujah bahawa perintah betul yang harus dibuat ialah bahawa hakim enggan menentukan isu-isu secara terus. H Mereka berhujah bahawa nampaknya terdapat konflik pendapat kehakiman mengenai kesan fasal opsyen, dan ekoran itu, perbicaraan tindakan harus diadakan. Selanjutnya, mereka juga berhujah bahawa oleh kerana milikan merupakan suatu isu, status quo harus dikekalkan, iaitu penentang-penentang patut diberi milikan. Perayu-perayu telah I berhujah bahawa tidak terdapat konflik sebenar dalam undang-undang kes atas perkara itu dan semua material yang dikehendaki atas penentuan isu relevan telahpun berada di hadapan mahkamah, dan

dengan itu, perkara yang berkenaan adalah sesuai untuk penyelesaian terus dan hakim sepatutnya menghakimi isu-isu dan memberi perintah yang diminta oleh perayu-perayu.

Diputuskan, membenarkan rayuan itu:

(1) Satu fasal opsyen adalah terbatal atas ketidakpastian melainkan jika perjanjian memperuntukkan mekanisme atau rumusan yang mahkamah boleh gunakan untuk memastikan apa yang sebaliknya tidak boleh dipastikan jika pihak-pihak yang terlibat tidak mencapai kata sepakat. Mahkamah juga tidak akan menghulurkan bantuan untuk menguatkuasakan sesuatu perjanjian yang tidak sempurna. Dalam kes ini, sewa untuk tempoh penyewaan yang dibaharui mesti disetujui oleh pihak-pihak. Perjanjian pembaharuan adalah eksekutori dan tidak terdapat mekanisme atau rumusan supaya mahkamah boleh memastikan sewa jika pihak-pihak tidak dapat mencapai persetujuan. Atas autoriti dan prinsip, perjanjian yang dikatakan itu adalah tidak elok akibat ketidakpastian. Justeru itu, fasal opsyen untuk tempoh lanjut pada 'suatu sewa yang disetujui' adalah terbatal atas sebab ketidakpastian dan perbicaraan adalah tidak diperlukan untuk mencapai keputusan sedemikian (lihat ms 93F, 94E dan 95D); *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665 dan *Zainal Abidin v Century Hotel Sdn Bhd* [1987] 1 MLJ 236 diikut.

(2) Tidak boleh dikatakan bahawa adalah tersirat bahawa perayu-perayu harus melakukan apa yang diperlukan secara munasabah untuk memastikan bahawa pihak-pihak telah mencapai suatu perjanjian kerana itu adalah seperti meminta mahkamah menambahkan satu lagi fasal kepada perjanjian itu. Bagaimanapun, sama ada pihak-pihak yang terlibat ataupun mahkamah tidak boleh menegas supaya pihak-pihak yang berkenaan mencapai satu perjanjian (lihat ms 95F).

(3) Fakta bahawa penentang-penentang percaya bahawa akan terdapat pembaharuan penyewaan dan meneruskan perniagaan atas dasar kepercayaan demikian tidak mengestop secara per se perayu-perayu daripada mengambil pendirian bahawa tidak akan terdapat pembaharuan penyewaan ataupun menghapuskan keperluan bahawa persetujuan tentang sewa harus dicapai sebelum pembaharuan. Tidak terdapat representasi bahawa penentang-penentang telah melakukan apa-apa untuk menjejaskan kedudukan perayu-perayu yang membolehkan mereka berhak bergantung kepada estopel (lihat ms 95I dan 96A).]

Notes

For cases on options for renewal of leases, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1238–1240.

For a case on contract which was void for uncertainy, see 3 *Mallal's Digest* (4th Ed, 1995 Reissue) para 2280.

Cases referred to

Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600
British Bank for Foreign Trade Ltd v Novinex Ltd [1949] 1 KB 623
Corson v Rhuddlan Borough Council [1990] 1 EGLR 255, 59 P & CR 185
Express Powers Ltd v Bank of Nova Scotia, Re 73 DLR (4th) 400
Foley v Classique Coaches Ltd [1934] 2 KB 1
Griffin v Martens [1988] 27 BCLR (2d) 152
Hillas & Co Ltd v Arcos Ltd (1932) 147 LT 503
King's Motors (Oxford) Ltd v Lax [1969] 3 All ER 665
Lewis v Stephenson (1898) 67 LJQB 296
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor [1995] 1 MLJ 719
Rothwell v Wareling (1974) 29 P & CR 234
Smith v Morgan [1971] 2 All ER 1500
Sudbrook Trading Estate Ltd v Eggleton [1981] 3 All ER 105, [1983] 1 AC 444
Trustees of National Deposit Friendly Society v Beatties of London Ltd [1985] 2 EGLR 59
Zainal Abidin v Century Hotel Sdn Bhd [1987] 1 MLJ 236

Legislation referred to

Rules of the High Court 1980 O 14

Appeal from: Civil Suit No S2–22–167–1994 (High Court, Kuala Lumpur)

Robert Lazar (*Shearn Delamore & Co*) for the appellants.
Romesh Abraham (*Shook Lin & Bok*) for the respondents.

Cur Adv Vult

12 October 1995

VC George JCA: The focal point on which this appeal turns is the effect of the option clause in the written three-year tenancy agreement dated 15 June 1991 in respect of the Wisma Sime Darby car park owned by the appellant landlord, Wilson Sime Darby Sdn Bhd ('the appellants') which the respondents, Wilson Parking, were occupying and operating as tenants and in respect of which, inter alia, they were to provide all necessary equipment for the smooth operation of the car-parking facilities. The option clause is s 8.07 which is as follows:

Section 8.07 — Renewal of Tenancy

The landlord shall, on the written request of the tenant made three (3) months before the expiration of the term hereby created and if there shall not be at the time of such request any existing breach or non-observance of any of the covenants on the part of the tenant hereinbefore contained, grant

> to the tenant a tenancy of the demised premises *for a further term of three (3) years from the expiration of the said term at a rent to be agreed* but otherwise containing the like covenants and provisions as are herein contained with the exception of the present covenant for renewal [Emphasis added].

Wilson Parking had well within the three months before the expiration of the terms of the tenancy, by its letter of 11 October 1993, exercised the option. They wrote to the appellants:

> *Re: Renewal of Tenancy Agreement between Wisma Sime Darby Sdn Bhd and Wilson Parking (M) Sdn Bhd for the Wisma Sime Darby Car Park*
>
> In view of the expiring of the above tenancy agreement on 28 February 1994, we hereby give our notice to request you to renew for a further term of 3 years as stated in s 8.07 of the tenancy agreement signed between Wisma Sime Darby Sdn Bhd and Wilson Parking (M) Sdn Bhd dated 15 June 1991.
>
> Thank you.
>
> Yours sincerely,
> Wilson Parking (M) Sdn Bhd.

Nothing was said about the rent for the proposed new term. However, by its letter dated 30 November 1993, the respondents, in response to the appellants' inquiry as to what sort of rent the respondents had in mind, proposed that the rent for the new term be increased from the old rent of RM44,000 to RM48,000 per month.

In the meantime, the respondents had on or about 10 November 1993 commenced the installation of new parking equipment said to cost some RM45,000. The offer of RM48,000 was followed by meetings and discussions between the representatives of the parties resulting in the respondents by its letter of 15 January 1994 increasing their offer to RM54,000 a month. In response to this, the appellants by their letter of 2 February 1994 in effect informed the respondents that they were inviting others interested in taking over the tenancy of the car park to make offers and invited the respondents to make their offer in respect of the rental for the renewal of the tenancy in competition with the others who had been invited to tender for the tenancy. The letter ended with the appellants informing the respondents that 'the company does not undertake to accept the lowest or any tender'. The respondents, it would seem, went along with this proposal by the appellants and submitted their tender by their letter of 8 February 1994 (which, it is to be noted, referred to the appellants' letter of 2 February 1994 inviting them to join in the tender exercise) and offered to 'lease the Wisma Sime Darby car park in Jalan Raja Laut for a monthly rental of RM56,000'.

The respondents' tender was not accepted. That of one Metro Parking (M) Sdn Bhd was accepted.

A Thereafter, the appellants extended the existing lease till the end of March 1994, obviously to enable the respondents to wind up the car-park operations and give up vacant possession.

The respondents, however, now took the position that because they had exercised the option within the requisite period there was, in fact, a B concluded tenancy agreement in respect of the car park for another three years from 1 March 1994. It was, and is, contended that the fact that there had been no agreement on rental, was not relevant. That the respondents were prepared to negotiate further on the rent was said to be relevant.

The appellants did not share this view and caused their writ to issue C against the respondents, seeking a declaration that the respondents' tenancy had been lawfully determined and for consequential orders including vacant possession and damages. The appellants caused two summonses to issue, one dated 4 April 1994 for an injunction restraining the respondents from obstructing the appellants re-taking possession of the premises and for other related orders and the other dated 26 April 1994 seeking summary D judgment under O 14. The respondents, in turn, took out their summons seeking to restrain the appellants from interfering with the respondents' continued occupation of the premises until the trial of the action or further order. All three summonses were heard together and all of them were dismissed with costs. The plaintiffs appealed and are the appellants here.

E The learned judge's grounds of decision, through no fault of the solicitors, have not been made available to us. Mr Romesh Abraham, counsel for the respondents, contended that the judge refusing to dispose of the issues summarily is the correct order to be made. He went on to submit that there appears to be a conflict in judicial opinion on the focal point in this case, ie in respect of the effect of the option clause and F accordingly, in any event, there ought to be, at least for that reason, a trial of the action. And that since possession is in issue, pending the trial, the status quo should be maintained and as the respondents were in possession, they should be kept in possession.

Mr Robert Lazar says that there is no real conflict in the cases on the G point and all the material needed for the determination of the relevant issues were before the court and accordingly, the matter was properly before the judge for summary disposal and he should have adjudicated the issues and should have given the appellants the orders that they had sought.

H Mr Lazar went on to submit that the option clause as set out in the agreement here is similar to the option clause in *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665 and that on the strength of the judgment in that case which in his submission correctly stated the law, the learned judge should have held that there was no concluded agreement between the parties and that it follows that the respondents were improperly holding I over.

Now, *King's Motors* was considered and applied by the Supreme Court in *Zainal Abidin v Century Hotel Sdn Bhd* [1987] 1 MLJ 236 at p 238 where Seah SCJ, writing the judgment of the court, said:

The option clause in the tenancy agreement reads:

> 'The Lessor will on the written request of the Lessee made two (2) months before the expiration of the term hereby created grant to the Lessee a further term of three (3) years from the date of the said expiration *at a rent to be agreed upon* but containing the same covenants and provisions with the exception of this clause PROVIDED HOWEVER that the Lessee shall not then be in a breach of any of the terms and conditions herein expressed to be observed or performed by the Lessee.'. [Emphasis added]

A similar clause came up for decision in *King's Motors (Oxford) Ltd v Lax & Anor* [1969] 3 All ER 665. Burgess V-C held that an option in a lease for a further term 'at such rental as may be agreed upon between the parties' was, at least, where there was no relevant arbitration clause, void for uncertainty, in the absence of agreement between the parties. *King's Motors'* case was considered by Brightman J in *Smith v Morgan* [1971] 2 All ER 1500 at p 1504.

> In our opinion, an option clause (like the one here) in a lease does not give rise to any legal obligations on the part of either party unless and until the lessee gives notice in writing to the lessor, within the stipulated period, of his intention to extend the lease *and the parties have mutually agreed to the new rent*. Until these two conditions are satisfied the option clause, in our judgment, could not be legally enforced against the lessor. [Emphasis added]

The main issue in the instant case boils down to whether or not there was a concluded agreement between the parties in respect of the tenancy for a further term of three years.

The option clause in *King's Motors* was as follows:

> If the Tenants shall be desirous of continuing the term hereby created for a further term of seven years at the expiration of the term hereby granted and shall six months before the expiration of the term hereby created give to the Landlords a notice in writing of such their desire and shall pay the rent hereby reserved and perform the several stipulations herein contained and on their part to be observed and performed up to the termination of the term hereby created then the Landlords will let the premises to the Tenants for a further term of seven years *at such a rental as may be agreed upon between the parties hereto in writing PRIOR to the expiration of the term hereby granted* and subject in all other respects to the same stipulations as are herein contained except this clause for renewal. [Emphasis added]

Mr Abraham suggested that this clause has to be distinguished from the option clause in the instant case, in that there was a requirement in the *King's Motors'* clause for agreement to be arrived at on the rent for the new term prior to the expiration of the initial fixed term; whereas in the option clause in the instant case, no time limit is provided in the option clause for agreement to be arrived at on the rental.

I see no merit in this submission. The question is whether there was a concluded agreement. If no agreement had been arrived at on that most crucial element of the agreement — rent — there cannot be said to be a concluded agreement. That the parties might eventually agree on the rent does not make for a concluded agreement. The question 'what if they

never arrive at an agreement as to the new rent?' brings home the lack of merit in the submission.

Mr Abraham was perhaps on stronger ground in his submission that the courts, if at all possible, would not allow a commercial agreement to go under for want of certainty. It was submitted that in an option clause of the type in *King's Motors* and in the instant case, the court should imply that the parties had in mind that the rental for the new term should be 'fair or reasonable rent' and if the parties cannot agree on such fair or reasonable rent, the court would decide for them what such rent is.

Counsel relied on *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 in which Gopal Sri Ram JCA, writing the main judgment of the Court of Appeal, had said that *King's Motors* (referred to in the judgment as '*Lax*') was wrongly decided.

Gopal Sri Ram JCA took the view that *King's Motors* was a controversial decision. He noted, and disagreed with, the view expressed in *King's Motors* that an option clause in a lease for a further term at such rental as may be agreed upon between the parties was, in the absence at least of an arbitration clause, void for uncertainty. Although the learned judge himself went on to recollect that that judgment had been applied some 17 years later by the (then) Supreme Court in *Zainal Abidin v Century Hotel Sdn Bhd* where, as has been seen, an option for a further term of three years 'at a rent to be agreed upon' but otherwise upon the same terms and conditions with the exception of the option clause' was held not to give rise to any legal obligation until agreement had been arrived at on the rent, he thought that *King's Motors* should not be followed.

He said at pp 749–750 of *Luggage*:

> In my opinion, the time has come to openly repudiate the decision in *Lax* rather than to make an attempt at circuitous logic by distinguishing it from case to case. For my part, I would take the more direct approach and say that *Lax* was wrongly decided and that it should no longer be followed here.

What appears to have considerably influenced the learned Court of Appeal judge into holding that *King's Motors,* and a fortiorari even *Zainal Abidin* on the point, should not be followed was his understanding that 'almost every case decided by an English court after [*King's Motors*] has sought to distinguish it'. Reference was made to, and reliance placed by him on, *Smith v Morgan* [1971] 2 All ER 1500; *Rothwell v Wareling* (1974) 29 P & CR 234; and *Trustees of National Deposit Friendly Society v Beatties of London Ltd* [1985] 2 EGLR 59. It is to be noted that all these cases are pre-*Zainal Abidin*. However, the learned judge went on to say that he thought that the strongest possible indication that *King's Motors* was wrongly decided is to be found in the post-*Zainal Abidin*'s case, *Corson v Rhuddlan Borough Council* [1990] 1 EGLR 255; 59 P & CR 185.

With respect, an examination of those cases clearly demonstrates that the point to be taken from the English courts distinguishing *King's Motors* from the

cases that came before them after that case is not that *King's Motors* was wrongly decided but that it could not be applied to those cases because on the facts they had to be distinguished from *King's Motors*. Also, an examination of those three cases referred to on the point in *Luggage*, I am afraid, does not suggest that the judges there were indulging in 'circuitous logic' to avoid an open repudiation of *King's Motors*. Let me now deal with each of those judgments and to some of the cases referred to in them.

In *Smith v Morgan*, a clause in a conveyance for the sale of certain land provided that should the vendor wish at any later date to sell certain adjoining land the 'first option of purchasing that land should be given to the purchaser' at a figure to be agreed upon. The vendor tried to get out of giving the first option to the purchaser and sought to rely on *King's Motors*. Brightman J said at p 1504:

> It seems to me that [*King's Motors*] was a different case because there the agreement as to the rent was made an integral part of the option procedure. In the present case agreement as to price is no part of the offer which the vendor is bound to make. I therefore think that the vendor cannot rely on that decision as concluding this case. *However, I reject the purchaser's submission that the vendor, should she wish to sell, is bound to offer the property at market value or at such value as the court may determine, as suggested by the points of counterclaim.*
>
> Paragraph 1 of Sch 2 to the conveyance states nothing whatever about market value and nothing about a reference to the court, even if the court were willing to accept such a reference. In my view it is implicit in para 1 of Sch 2 that a purchase, if it results from an offer, should be at a price acceptable to both parties. *On that basis it appears to me that para 1 can only mean one thing: that the obligation on the vendor, should she wish to sell, is an obligation to make an offer to the purchaser at the price and at no more than the price at which she is, as a matter of fact, willing to sell. If that offer is accepted by the purchaser, then there will be a purchase at a figure which has been agreed on. If the offer is rejected, then cadit quaestio.* [Emphasis added]

The point made is that the offer had to be made. In respect of that, it was not a case on uncertainty. And it seems to me that the portions of the quotation from *Smith v Morgan* that I have provided emphasis, in effect reiterates the principle stated in *King's Motors*.

Trustees of National Deposit Friendly Society v Beatties of London Ltd was distinguished from *King's Motors* because, unlike the position in *King's Motors*, in *Trustees* the agreement had been substantially performed by one party. The tenant had given up its legal claim to continue with the tenancy of the ground floor and part of the basement of a shophouse in a commercial centre in London called High Holborn (that it had occupied as tenant for some 75 years) to enable the landlord to pull down the building and rebuild, upon there being given to the tenant an option to take up the tenancy of the ground floor and basement of the reconstructed building. The tenant exercised the option but in respect of the provisions in the agreement between the parties for ascertaining the new rent the judge said, 'Even if there is no uncertainty there is great obscurity and imperfect expression.' He then proceeded to apply what in effect was an exception to

A the rule on which *King's Motors* was decided. The principle that was followed was as stated by Templeman LJ in *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 460, [1981] 3 All ER 105 at 115 (and which was approved by the House of Lords when the case went to the House), and was in these terms:

B

> Where an agreement which would otherwise be unenforceable for want of certainty or finality in an essential stipulation has been partly performed so that the intervention of the court is necessary in aid of a grant that has already taken effect, the court will strain to the utmost to supply the want of certainty even to the extent of providing a substitute machinery.

C Again, we see a reiteration in no uncertain terms of the *King's Motors'* principle followed by an explanation that justifies an exception to the rule. Reference was also made in *Trustees* to the headnote of Denning J's (as he then was) judgment in *British Bank for Foreign Trade Ltd v Novinex Ltd* [1949] 1 KB 623 at 624–625, which also reiterates the rule in *King's Motors* and explains that part performance provides an exception to the
D rule:

> The court approved the statement of the trial judge as to the law applicable to the first point:
>
> 'The principle to be deduced from the cases is that if there is an essential term which has yet to be agreed and there is no express or implied provision
E for its solution, the result in point of law is that there is no binding contract. In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides and one which has been executed on one side or the other. In the ordinary way, if there is an arrangement to supply goods at a price "to be agreed", or to perform services on terms "to be agreed", then, although,
F while the matter is still executory, there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without having come to an agreement as to the price or the terms, then the law will say that there is necessarily implied, from the conduct of the parties, a contract that, in default of agreement, a reasonable sum is to be paid.'

G In *Rothwell v Wareling*, Megarry J construed the provision that on due request, the landlord would grant to the tenant 'a lease of the demised premises for a rent and containing the like covenants and provisions as are herein contained with the exception of the present covenant for renewal, the lessor on the execution of such renewed lease to execute a counterpart thereof' as a covenant to renew on the same terms (including the same rent as
H in the previous term) but without the renewal clause. Megarry J explained:

> 'the present covenant for renewal' and 'such renewed lease' in the clause, showed that, although the clause as a whole was framed as a landlord's covenant to 'grant' a lease 'for a rent', the parties were treating the clause as being a covenant for renewal which must mean that the grant of a new
I lease for a rent was to be a renewal of the original lease, so that the rent would be the same as in that lease.

In so holding, he was not running foul of what is really an elementary principle that where an essential term in a contract is uncertain, the court

will not rewrite the agreement for the parties. He was not saying that since the agreement was vague in respect of what the rent should be, the court will imply a fair rent or market rent. He was saying per se the words 'a rent' make for uncertainty but, read in the light of the reference in the clause to 'renewal of the lease', it becomes clear that what was agreed was that there could be a renewal on the same terms. The effect of the provision for a renewal of a lease was discussed by Bruce J in *Lewis v Stephenson,* reference to which will be made later in this judgment.

As has been seen, *Corson v Rhuddlan Borough Council* had great influence on Gopal Sri Ram JCA. There, the option was to take up the new lease at a rent to be agreed but such rent not to exceed £1,150 p a. The tenant, in exercising the option, offered to pay the maximum rent that the landlord could charge, ie £1,150 p a. The provision for maximum rent in *Corson* provided the machinery for ascertainment of the rent. There was nothing like that in *King's Motors*. Ralph Gibson LJ, who wrote the leading judgment in *Corson,* pointed out the distinction. He said ((1990) 59 P & CR 185 at p 194):

> It is again, I think, not necessary for the court to decide whether the decision in [*King's Motors*] was correct because the provision for a maximum rent is, in my judgment, a material distinction.

No doubt he then went on to say that 'for his part he was inclined to the view that [*King's Motors*] was, as Mr George submitted, wrongly decided ...' Such an 'inclination' obviously was not meant to be a considered or conclusive opinion on the matter and for that reason and in any event was obiter.

Ralph Gibson LJ had relied on *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 and on *Foley v Classique Coaches Ltd* [1934] 2 KB 1. In *Hillas,* it was a contract to buy Russian softwood timber. The court, in construing the agreement to buy '22000 standards of soft wood goods of fair specification over the season 1930', looked at the whole contract and the evidence given as to the course of the trade to hold that the term 'fair specifications' was a term of art in the trade and that that provided the machinery for the courts in case of resort being made to it, to ascertain the kinds, quality and size of the timber that had to be supplied.

Ralph Gibson LJ himself pointed out that the provision of a formula for the determination of the rent made all the difference. He said at p 190:

> Subject to the point raised in the respondent's notice, it seems to me that, without implication of the term for the rent to be a fair rent, the parties had not provided any formula for the determination of the rent to be agreed. Without some standard or formula, the court could not regard the option as valid because determination of the rent would:
>
> > 'involve an adjustment between the conflicting interests of the parties which the parties have left unsettled and on which the court is not entitled to adjudicate:'
>
> see per Lord Thankerton in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 at p 513.

A Again, we see approbation being given to the rule expressed in *King's Motors.*

Similarly, in *Foley*, the defendant had agreed to buy all its petrol from the plaintiff at 'prices to be agreed from time to time'. The agreement went on to have an arbitration clause which could be invoked in the event of
B failure to agree on the price of the petrol. So, again there was the machinery to ascertain what would otherwise be unascertainable without the parties coming to an agreement. Ralph Gibson LJ pointed out in *Corson* ((1990) 5 P & CR 185 at p 193) that in *Foley*, the Court of Appeal:

> ... after consideration of the cases of *May and Butcher Ltd v R* and *Hillas & Co Ltd v Arcos Ltd*, held that a term must be implied in the agreement that
C the petrol supplied should be of reasonable quality and be sold at a reasonable price, and that, if any dispute arose as to what was a reasonable price, it was to be determined by arbitration under the arbitration clause. There was therefore:
>
> > 'an effective and enforceable contract although as to the future no
> D definite price had been agreed with regard to the petrol.'

In *Foley,* the arbitration clause made all the difference. Scrutton LJ said in that case at p 10:

> In the present case the parties obviously believed they had a contract and they acted for three years as if they had; they had an arbitration clause which
> E relates to the subject matter of the agreement as to the supply of petrol, and it seems to me that this arbitration clause applies to any failure to agree as to the price.

And so it would seem that, although Ralph Gibson LJ had said that he was inclined to the view that *King's Motors* was wrongly decided, such inclination
F is inexplicable both on principle and even on the judgments relied on by him, each of which is consistent with the principle that unless the agreement provided the machinery or some formula that the courts can utilize to ascertain what otherwise is unascertainable without the parties coming to an agreement, the option clause is bad for uncertainty.

G The judgment of Bruce J in *Lewis v Stephenson* (1898) 67 LJQB 296 was quoted in extenso by Gopal Sri Ram JCA in dealing with uncertainty, where one term of the contract was left for the parties to agree upon. In *Luggage*, the material words in the option were 'plus a further two years option' and in *Lewis v Stephenson* 'with the option of renewal' — Bruce J pointed out that the word 'renewed' signified 'to repeat; to put again in
H act'. He quoted from Lord Abinger speaking of a renewed lease [in *Price v Asheton* (1834) 4 LJ Ex Eq 3]: 'That is a renewal of the old lease and therefore in point of duration, coinciding with the former lease ... a lease containing the same terms.' That diction of Lord Abinger, and the view taken by Bruce J on the point no doubt were most apt in *Luggage,* but has
I no application here where the option specifically leaves a crucial element of the new agreement to be re-negotiated.

In my respectful judgment, the suggestion by Ralph Gibson LJ that he was inclined to agree with counsel that *King's Motors* was wrongly

decided and Gopal Sri Ram JCA's support of that opinion cannot be supported. It perhaps is not irrelevant to point out that I was on the coram of *Luggage* but had indicated there (at pp 766–767) my reservation on the view taken in the main judgment of *King's Motors*:

> I had earlier, in expressing full accord and agreement with the judgment herein of Gopal Sri Ram JCA, mentioned a reservation. That is in respect of his holding that *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665; [1970] 1 WLR 426 was wrongly decided. In *Lax*, it was held that an option in a lease for a further term 'at such rental as may be agreed upon between the parties' was, in the absence of any arbitration clause, void for uncertainty. With respect, I think that the point is arguable and not only because it was after all followed by our Supreme Court in *Zainal Abidin v Century Hotel Sdn Bhd* [1987] 1 MLJ 236.
>
> However, vis-à-vis the issues in the instant case, nothing turns on the view I take of *Lax* ...

The High Court in Australia in *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 referred to the renewal clause in a lease which provided that renewal of the lease shall be at such rental:

> ... as may be mutually agreed between the lessor and the lessee and failing agreement then such rental as may be fixed by an arbitrator nominated in accordance with the provisions of cl 3.04(b) but in any event the rental shall not be less than the rental payable in the last year of the first term.

The judgment, I think, succinctly states the law on the point at p 604 of the report:

> It is established by authority, both ancient and modern, that the courts will not lend their aid to the enforcement of an incomplete agreement, being no more than an agreement of the parties to agree at some time in the future. Consequently, if the lease provided for a renewal 'at a rental to be agreed' there would clearly be no enforceable agreement. On the other hand, it is also well established that the parties to a contract may leave terms — even essential terms — to be determined by a third person: see the cases cited in *Godecke & Anor v Kirwan* (1973) 1 ALR 457. In the present case, the lease itself provides the entire mechanism for determining the rental for the renewed term. There is no further agreement required of the parties. It is true that if they do agree upon that rental, then there is no occasion to resort to the independent mechanism that the lease provides. But, there being no such agreement, all that is required is that the President name a person to fix a figure being not less than the minimum rental operative during the original term.

A passage in the judgment of the Court of Appeal of British Columbia in *Re Express Powers Ltd v Bank of Nova Scotia* 73 DLR (4th) 400 at p 403, is worth reproducing:

> The principal question in the appeal is whether the renewal clause was void either for uncertainty or, what is fundamentally the same, as an agreement to agree. The obverse of that question is: If the renewal clause is not void, what does it mean?

What was said by this court about interim agreements in *Griffin v Martens* [1988] 27 BCLR (2d) 152 at p 153, 10 ACWS (3d) 196 (CA) is equally true about leases:

> It is not the function of the courts to set interim agreements aside for uncertainty because they contain a clause that is not precisely expressed. If such a clause has an ascertainable meaning, then the courts should strive to find it. See *Hillas & Co Ltd v Arcos Ltd* [1932] 147 LT 503 (HL), particularly per Lord Wright at p 514; *Meehan v Jones* (1982) 149 CLR 571 (Aus HC); and *Wiebe v Bobsien* 64 BCLR 295 [1986] 4 WWR 270, 39 RPR 228, 20 DLR (4th) 475 (CA), particularly per Mr Justice Seaton at p 297. As long as an agreement is not being constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves. On the other hand, it is well established that if all that the parties say is that they will enter into a lease at a rental to be agreed, no enforceable lease obligation is created.

Coming back to the instant case, we see that rental for the renewal period of the tenancy had to be agreed by the parties. The agreement for renewal was executory and there was no machinery or formula for the court to ascertain the rent if the parties could not come to an agreement on the rent. On authority and on principle, the agreement to agree is bad for uncertainty. The court cannot, and should not, make a bargain for the parties. There was no need for a trial to come to that conclusion.

King's Motors restates an elementary principle and is not controversial. Further that case and the principle it stated having been given approbation by the Supreme Court in *Zainal Abidin*, the principle of stare decisis makes it mandatory for even the Court of Appeal to apply it.

The two other points relied on by Mr Abraham can now be dealt with. The first of this is his contention that it was implied that the appellants should have done all that was reasonably necessary to ensure that the parties reach an agreement. I agree with Mr Lazar that that is asking the court to add yet another clause to the agreement. In any event, neither the parties nor the court may insist that the parties come to an agreement. You may take the mule to the water but you cannot make it drink it.

The second point made was that the appellants were estopped from taking the position that there will be no renewal of the tenancy. Reliance was placed on the contention that the respondents had represented to and the appellants had appreciated that the respondents had in mind a five-year depreciation of their equipment and which had resulted in the inclusion of the option clause in the tenancy agreement, that the appellants had said that it was not their policy to change car-park operators and that the appellants had required the respondents to upgrade their equipment and propose a better system of flow of traffic. These contentions do not do away with, or even water down, the requirement that agreement had to be arrived at on rental before there is a renewal. The contentions do not provide a basis for relying on estoppel. All that can be said at best for the

respondents is that they believed, and went about their business on the basis of such belief, that there would be a renewal. That per se does not provide an estoppel in respect of such renewal and certainly not for the requirement that agreement be arrived at on rent. There has not been the sort of representation by or on behalf of the appellants in respect of which the respondents acted to their detriment that entitles the respondents to rely on estoppel.

The appeal has to be allowed with costs. Consequently, there should be judgment for the appellants in terms of prayers 1, 2 and 3 of the O 14 application which is their summons in chambers dated 26 April 1994 and is at p 40 of the record of appeal. There will be no order on the appellants' other summons in chambers dated 4 April 1994, which is at p 34 of the record of appeal save that the costs thereof shall be paid by the respondents.

15 October 1995

Siti Norma Yaakob JCA: I have had the benefit of reading the draft judgment of my learned brother VC George JCA and I concur with the reasons expressed in his judgment when allowing this appeal with costs. I also endorse the other consequential orders:

(1) that there be judgment for the appellants in terms of prayers 1, 2 and 3 of the O 14 summons in chambers dated 26 April 1994 appearing at p 40 of the record of appeal;

(2) that there be no order on the appellants' summons in chambers dated 4 April 1994 appearing at p 34 of the record of appeal save that costs of it will be paid for by the respondents to the appellants; and

(3) that the deposit be refunded to the appellants.

15 October 1995

Ahmad Fairuz J: I concur.

Order accordingly.

Reported by Choo Siew Ling